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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Communications Assistance for)
Law Enforcement Act)

CC Docket No. 97-213
DA No. 98-762

COMMENTS OF THE

TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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SUMMARY

The Communications Assistance for Law Enforcement Act ("CALEA") authorizes the Commission to extend the Act's October 25, 1998 capability compliance deadline "if the Commission determines that compliance . . . is not reasonably achievable through application of technology available within the compliance period."¹ It also authorizes the Commission to "provide a reasonable time and conditions for compliance" in the event an industry standard is challenged as deficient.²

It is undisputed that CALEA-compliant technology will not be commercially available by October 25, 1998. Despite the good faith and substantial efforts made by telecommunications manufacturers over the last three-and-a-half years to implement CALEA's assistance capability provisions, the continued delays and disputes regarding both the Attorney General's Final Capacity Notice and the industry standard have prevented manufacturers from completing their solutions by that date.

Thus, the Telecommunications Industry Association ("TIA") respectfully urges the Commission to exercise its authority under sections 107(b)(5) and 107(c) of CALEA and to grant a two-year extension of the compliance deadline. In order to minimize administrative burden on both the industry and the Commission, TIA also urges the Commission to grant such an extension on an industry-wide basis. As the Commission has noted, all telecommunications carriers are identically situated and it would serve no public purpose for them to prepare and the Commission to review potentially thousands of essentially redundant extension requests.

¹ Pub. L. 103-414, 108 Stat. 4279, § 107(c) (1994), *codified at* 47 U.S.C. § 1006(c).

² Section 107(b)(5) of CALEA; 47 U.S.C. § 1006(b)(5).

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To: The Commission

**COMMENTS OF THE TELECOMMUNICATIONS
INDUSTRY ASSOCIATION**

On April 20, 1998, the Federal Communications Commission issued a Public Notice, seeking comments on the several petitions currently pending before the Commission in this matter.¹ In particular, the Commission sought comments regarding extension of the October 25, 1998 carrier compliance date for the Communications Assistance for Law Enforcement Act ("CALEA").² The Telecommunications Industry Association ("TIA")³ respectfully submits these comments, urging the Commission to grant a universal extension of the compliance date because compliance with CALEA's assistance capability requirements is not reasonably achievable through the application of existing technology.

¹ Public Notice, *In the Matter of Communication Assistance for Law Enforcement Act*, DA No. 98-762, CC Docket No. 97-213 (released on April 20, 1998) ("Public Notice").

² Pub. L. 103-414, 108 Stat. 4279 (1994), *codified at* 47 U.S.C. §§ 1001 *et seq.*

³ TIA is a national, full-service trade association of over 900 small and large companies that provide communications and information technology products, materials, systems, distribution services and professional services in the United States and around the world. TIA is accredited by the American National Standards Institute ("ANSI") to issue standards for the industry.

I. INTRODUCTION

It is undisputed, even by the Federal Bureau of Investigation ("FBI"), that compliance with CALEA's assistance capability requirements is not "reasonably achievable" by October 25, 1998. The four major industry associations all testified to this fact last October before the House Judiciary Subcommittee on Crime⁴ and, in January, the FBI released a report to Congress demonstrating the same.⁵ During the Commission's recent Notice of Proposed Rulemaking, innumerable comments were filed on the same point, urging the Commission to extend the compliance date⁶ -- as did the petition for rulemaking filed by CTIA last July.⁷

⁴ Testimony of Mr. Matthew J. Flanagan, President, Telecommunications Industry Association before the House Judiciary Subcommittee on Crime (Oct. 27, 1997); Testimony of Mr. Jay Kitchen, President, Personal Communications Industry Association ("PCIA") before the House Judiciary Subcommittee on Crime (Oct. 27, 1997); Testimony of Mr. Roy Neel, President, United States Telephone Association ("USTA") before the House Judiciary Subcommittee on Crime (Oct. 27, 1997); Testimony of Mr. Thomas Wheeler, President, Cellular Telecommunications Industry Association ("CTIA") before the House Judiciary Subcommittee on Crime (Oct. 27, 1997).

⁵ Federal Bureau of Investigation, *Communications Assistance for Law Enforcement Act (CALEA) Implementation Report*, at 15 & Appendix B (January 26, 1998) ("1998 Implementation Report").

⁶ Notice of Proposed Rulemaking, *In the Matter of Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, FCC Docket No. 97-356 (released Oct. 10, 1997) ("NPRM"). See, e.g., Comments of AirTouch Communications, Inc., at 4 ("[E]ven the FBI acknowledged during a November 14, 1997 meeting with industry that CALEA's current compliance date of October 25, 1998 cannot now be met."); Comments of the American Civil Liberties Union, at 6-10; Reply Comments of the American Civil Liberties Union, at 7-10; Comments of the American Mobile Telecommunications Association, at 8; Comments of AT&T Corporation, at 27-28; Comments of Bell Atlantic Mobile, Inc., at 8-9; Comments of Bell South Corporation, at 18-19; Comments of CTIA, at 6-8; Reply Comments of CTIA, at 4-9; Comments of GTE Service Corporation, at 11-14; Comments of Motorola, at 11; Comments of Nextel Communications, at 15-16; Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, at 6-8; Comments of Paging Network, at 13-15; Comments of PCIA, at 3-5; Reply Comments of PCIA, at 5-7; Comments of PrimeCo Personal Communications, L.P., at 5-6; Comments of the Rural Telecommunications Group, at 6-7; Comments of TIA, at 9-11; Reply Comments of TIA, at 5-9; Comments of 360° Communications, at 7-8; Comments of United States Cellular Corporation, at 2-3; Comments of USTA, at 13-14; Comments of U.S. West, at 38-43.

⁷ CTIA, *Petition for Rulemaking in the Matter of Implementation of the Communications Assistance for Law Enforcement Act* (filed on July 16, 1997).

Legislation has even been introduced in Congress to extend the initial compliance date by approximately two years.⁸

The Commission now has before it petitions for rulemaking from the Center for Democracy and Technology ("CDT"),⁹ the U.S. Department of Justice ("Department" or "DoJ") and the FBI,¹⁰ the Telecommunications Industry Association,¹¹ and the United States Telephone Association.¹² In addition, CTIA, USTA and PCIA have filed a joint response to these pending petitions.¹³

Both CDT and the Department, pursuant to section 107(b) of CALEA, have asked the Commission to review the industry "safe harbor" standard (J-STD-025) jointly promulgated by TIA and Committee T1. CDT argues that the standard is overinclusive, containing provisions on location and packet data that exceed the scope of CALEA and, hence, impinge on individual privacy. The FBI and Department contend that J-STD-025 is underinclusive because

⁸ CALEA Implementation Amendments of 1998, H.R. 3321, 105th Cong. (introduced on March 4, 1998).

⁹ Center for Democracy and Technology, *Petition for Rulemaking under Sections 107 and 109 of the Communications Assistance for Law Enforcement Act* (filed March 26, 1998) ("CDT Petition").

¹⁰ Federal Bureau of Investigation and Department of Justice, *Joint Petition for Rulemaking for Establishment of Technical Requirements and Standards for Telecommunications Carrier Assistance Capabilities Under the Communications Assistance for Law Enforcement Act* (filed March 27, 1998) ("FBI/DoJ Joint Petition").

¹¹ TIA, *Petition for Rulemaking Under Section 1006 of the Communications Act of 1934, as amended, and Section 107 of the Communications Assistance for Law Enforcement Act to Resolve Technical Issues and Establish a New Compliance Schedule* (filed April 2, 1998) ("TIA Petition").

¹² USTA, *Petition for Extension Under the Compliance Date Under Section 107(c) of the Communications Assistance for Law Enforcement Act* (filed on April 24, 1998) ("USTA Petition").

¹³ CTIA, PCIA & USTA, *Response to Petition for Rulemaking for Establishment of Technical Standards for Telecommunications Carriers and a New Compliance Schedule under the Communications Assistance for Law Enforcement Act* (filed on April 9, 1998) ("Carrier Association Response").

it fails to provide nine additional surveillance features (the "punchlist") that industry and the privacy community had determined exceeded the scope of CALEA. TIA, joined by CTIA, PCIA and USTA, have asked the Commission to resolve this dispute and, pursuant to its explicit authority under section 107(b)(5) of CALEA, to toll the October 25, 1998 deadline and establish a reasonable compliance period.

In the last few weeks, several companies have filed petitions, pursuant to Section 107(c), seeking extensions of the compliance date.¹⁴ TIA is aware of several more companies that are in the process of drafting such petitions. The Commission, too, is aware of these proposed filings and has sought comment on how it "can most quickly and efficiently extend the compliance deadline" in order to reduce "the administrative burden on both the affected parties and the Commission."¹⁵ In these comments, TIA respectfully urges the Commission to exercise its authority, pursuant to both sections 107(b)(5) and 107(c) of CALEA, to grant a universal extension of the October 25, 1998 carrier compliance deadline.

¹⁴ AirTouch Communications, Inc. & Motorola, Inc., *Joint Petition for an Extension of the CALEA Assistance Capability Compliance Date* (filed on May 5, 1998) ("AirTouch Petition"); AirTouch Paging, Inc., *Petition for an Extension of the CALEA Assistance Capability Compliance Date* (filed on May 4, 1998) ("AirTouch Paging Petition"); Ameritech Operating Companies and Ameritech Mobile Communications, Inc., *Petition for the Extension of the Compliance Date Under Section 107 of the Communications Assistance for Law Enforcement Act* (filed on April 24, 1998) ("Ameritech Petition"); Powertel, Inc., *Petition for an Extension of Time to Comply with the Capability Requirements of Section 103 of the Communications Assistance for Law Enforcement Act* (filed on April 23, 1998) ("Powertel Petition"); PrimeCo Personal Communications, L.P., *Petition for an Extension of CALEA's Assistance Capability Compliance Date* (filed on April 21, 1998) ("PrimeCo Petition"); AT&T Wireless Services, Inc., Lucent Technologies Inc. & Ericsson Inc., *Petition for Extension of the Compliance Date under Section 107 of the Communications Assistance for Law Enforcement Act* (filed March 30, 1997) ("AT&T Wireless Petition").

¹⁵ Public Notice, ¶ 9.

II. STATUTORY AUTHORITY

As noted above, the Commission -- recognizing that many carriers are preparing to file individual petitions with the Commission -- has sought comments on "how the Commission can most quickly and efficiently extend the compliance deadline, assuming such an extension is warranted, particularly if it appears that the factors supporting an extension apply equally to large numbers of telecommunications carriers."¹⁶

Under CALEA, Congress granted the Commission two principal statutory methods for extending the compliance deadline: (1) pursuant to section 107(b)(5), as part of resolving a dispute regarding an industry standard; and (2) pursuant to section 107(c), upon petition by a telecommunications carrier.¹⁷ In addition, as a couple of petitioners have observed, the Commission was granted broad authority under section 301 to "prescribe such rules as are necessary to implement the requirements of the Communications Assistance for Law Enforcement Act."¹⁸ These provisions give the Commission the necessary authority to grant an industry-wide, universal extension of the compliance date -- without the necessity for individual

¹⁶ *Id.*

¹⁷ In addition, under section 109(b), the Commission is authorized to determine, upon petition from "any interested person," that compliance with CALEA's capability requirements is not "reasonably achievable" for equipment, facilities and services deployed after January 1, 1995. Section 109(b) of CALEA; 47 U.S.C. § 1008(b). An extension pursuant to section 109(b), however, would only cover a sub-set (i.e., that equipment deployed prior to January 1, 1995) of the equipment and facilities covered by an extension pursuant to either section 107(b)(5) or 107(c).

¹⁸ Section 301(a) of CALEA; 47 U.S.C. § 223. *See, e.g.,* Carrier Association Response, at 13 & n. 30; PrimeCo Petition, at 13 & n. 42. Of course, the Commission also enjoys broad authority under section 4(i) of the Communications Act. This section empowers the Commission to "perform any and all acts . . . not inconsistent with [the Communications Act], as may be necessary in the execution of its functions." Section 4(i) of Communications Act; 47 U.S.C. § 154(i).

carrier filings and, thus, "reduc[ing] the administrative burden on both the affected parties and the Commission" ¹⁹

A. Section 107(b)(5)

Section 107(b)(5) provides that "if a Government agency or any other person believes that [an industry standard is] deficient, the agency or person may petition the Commission to establish, by rule, technical requirements or standards" for implementing CALEA. Both the Department of Justice and the CDT have invoked this authority in challenging J-STD-025. As part of its responsibility to decide these challenges, the Commission is required to "provide a reasonable time and conditions for compliance with and the transition to any new standard, including defining the obligations of telecommunications carriers under section 103 during any transition period." ²⁰ By its very nature, this new compliance schedule

¹⁹ Public Notice, ¶ 9.

²⁰ Section 107(b)(5) of CALEA; 47 U.S.C. § 1006(b)(5).

In determining what constitutes "a reasonable time" for compliance, the Commission should consider the other factors set forth in section 107(b) and ensure that its compliance schedule:

- (1) meet[s] the assistance capability requirements of section 103 by cost-effective methods;
- (2) protect[s] the privacy and security of communications not authorized to be intercepted;
- (3) minimize[s] the cost of such compliance on residential ratepayers; and
- (4) serve[s] the policy of the United States to encourage the provision of new technologies and services to the public.

Section 107(b)(1)-(4) of CALEA; 47 U.S.C. § 1006(b)(1)-(4).

For example, if pressed to accelerate their development and implementation schedule to less than two years, manufacturers might not be able to meet the assistance capability requirements by the most cost-effective methods, as required by Section 107(b)(1). Similarly, any increased costs suffered by manufacturers in attempting to satisfy the Commission's final determination in less than two years would inevitably be passed along to the ratepayers -- a result directly contrary to the goal of minimizing the costs of compliance set forth in Section 107(b)(2). Finally, forcing industry to become CALEA compliant in under two years would not serve "the policy of the United States to encourage the provision of new technologies and services to the public," as enormous amounts of time and engineering manpower -- otherwise employed in the provision of such desirable technologies to the public -- would have to be dedicated to an accelerated implementation of CALEA.

would apply to all carriers that eventually implement solutions consistent with the Commission's final decision. Thus, section 107(b)(5) clearly provides the Commission with authority to issue a "blanket" extension (in the form of a new compliance date) for all similarly affected carriers.

The only carriers that might not be covered by this universal extension are those carriers (e.g., paging or satellite) to whom J-STD-025 does not apply. As TIA noted in its petition of rulemaking, there are several industries for which neither capacity nor capability requirements have been established.²¹ Indeed, senior officials of both the Department of Justice and the FBI have recognized that, because of resource constraints, the FBI has not focused on these industries and that compliance for such industries will have to be postponed until after compliance for the wireline, cellular and PCS industries has been resolved. The Commission should ensure that any extension of the compliance date includes manufacturers and carriers of all telecommunications products, not just those explicitly covered by J-STD-025, and recognize that some of these services have not even been initially addressed by the Department or FBI.

Section 107(b)'s authority is not limited to resolving disputes over existing industry standards. The section also authorizes petitions "[i]f industry associations or standards-

²¹ TIA Petition, at 10-11. See FBI, *Implementation of Section 104 of the Communications Assistance for Law Enforcement Act*, 63 Fed. Reg. 12218, 12220 (March 12, 1998) ("this Final Notice of Capacity should be viewed as the first phase applicable to telecommunications carriers offering services that are of most immediate concern to law enforcement -- that is, those telecommunications carriers offering local exchange services and certain commercial mobile radio services, specifically cellular service and personal communications services. . . . Law enforcement will consult with [those carriers excluded from the Notice] before applicable capacity requirements are established and subsequent notices are issued. Law enforcement looks forward to consulting with these other telecommunications carriers to develop a reasonable method for characterizing capacity requirements for them."); Joint Petition for an Expedited Rulemaking by the Department of Justice and Federal Bureau of Investigation, ¶ 3 (filed March 27, 1998) (indicating that J-STD-025 only applies to wireline, cellular and Personal Communications Services ("PCS") carriers).

setting organizations fail to issue technical requirements or standards. . . .”²² Thus, the Commission, either on petition by these remaining industries or on its own authority under section 301, may be able to note the absence of an industry standard for these industries and establish a compliance schedule for these industries to complete and implement their own capability standard.

B. Section 107(c)

Even if the Commission decides not to grant an extension under its section 107(b)(5) powers to industries not covered by J-STD-025, CALEA also grants the Commission the authority, on a petition by a telecommunications carrier, to extend the compliance deadline “if the Commission determines that compliance with the assistance capability requirements under section 103 is not reasonably achievable through application of technology available within the compliance period.”²³

As the Commission is aware, it is undisputed that CALEA-compliant technology will not be available, on an industry-wide basis, by October 25, 1998. Thus, to avoid the administrative inefficiency mentioned in its Public Notice, the Commission could consider several options for granting universal extensions under section 107(c).

One option, as suggested in petitions by both PrimeCo and AirTouch, is for the Commission to grant an extension to all carriers who use the same manufacturer’s equipment. Once the Commission has determined that compliance is not reasonably achievable for at least

²² Section 107(b) of CALEA; 47 U.S.C. § 1006(b).

²³ Section 107(c)(2) of CALEA; 47 U.S.C. § 1006(c)(2).

one of those carriers there is little point for the Commission not to grant an extension to all other, similarly-situated carriers. As PrimeCo notes, “[t]hese carriers find themselves in the same factual circumstances . . . and no purpose would be served by having carriers prepare and the Commission review hundreds (if not thousands) of essentially redundant extension requests.”²⁴

As the FBI has noted, however, section 107(c)(1) provides for a petition by “a telecommunications carrier,” suggesting that each carrier must individually file a petition.²⁵ If the Commission agrees with this interpretation, another option the Commission should consider is to entertain “bundled” petitions from groups of carriers. In order to avoid the repetition of hundreds of petitions reciting the same facts and legal arguments, carriers might participate in a joint document that outlines the facts and issues common to all parties. Each carrier could then append a separate petition, alluding to the joint document and providing any additional, specific facts that might be required. Such a compromise would address the FBI’s concerns and yet greatly reduce the administrative burden on both the Commission and petitioners.

C. Two-Year Extension

Whether the Commission acts under its authority pursuant to sections 107(b)(5) or 107(c), TIA has suggested that any extension should be at least 24 months long, consistent with standard industry practice. As the Commission is aware, once final technical standards are issued, manufacturers require approximately two to three years to (1) develop the hardware and software necessary to meet CALEA’s assistance capability requirements; and (2) work with their

²⁴ PrimeCo Petition, at i. *See also* PrimeCo Petition, at 13; AirTouch Petition, at 16.

²⁵ FBI Reply Comments to CALEA NPRM, at iii and 12.

carrier customers to modify the carrier's equipment, facilities, and services to accept the new technology.²⁶ Even the Department of Justice and FBI have acknowledged that a new compliance period of approximately 18 months from the Commission's order in this proceeding will be necessary.²⁷

III. COMPLIANCE WITH THE OCTOBER 25, 1998 COMPLIANCE DATE IS NOT REASONABLY ACHIEVABLE

TIA's members have always taken seriously their obligations under CALEA to provide equipment to their carrier customers "on a reasonably timely basis and at a reasonable charge."²⁸ As TIA observed in its comments in the Commission's recent NPRM, "it is not a question of whether the telecommunications industry supports CALEA's goals, only one of the appropriate timing of CALEA's implementation."²⁹

Because of regrettable delays in the industry standards process (caused by the ongoing disputes over CALEA's capability requirements) and the publication of the FBI's final capacity notice (well beyond the date Congress originally had anticipated), CALEA-compliant

²⁶ See TIA Petition, at 8; AT&T Wireless Petition, at 6 & 10; Ameritech Petition, at 7-8; AirTouch Petition, at 15.

²⁷ See DoJ/FBI Joint Petition, at 63 (asking the Commission to "provide a reasonable time for compliance with the technical standards adopted in this rulemaking proceeding by making the standards effective 18 months after the date of the Commission's decision and order"); *Ex Parte* Letter by the Department of Justice and Federal Bureau of Investigation (filed on April 14, 1998); Testimony of the Attorney General before the House Appropriations Subcommittee for Commerce, State, Justice, the Judiciary and Related Agencies (February 26, 1998).

²⁸ Section 106(b) of CALEA; 47 U.S.C. § 1005(b).

²⁹ TIA Reply Comments to CALEA NPRM, at 3.

equipment will not be commercially available by October 25, 1998.³⁰ As a result, as mentioned above, it is universally recognized -- even by the Department of Justice and FBI -- that compliance will not be reasonably achievable by that date.

The current challenges of the industry standard only further delay industry efforts to make CALEA-compliant equipment available. It is technically impractical and financially imprudent for manufacturers and their carrier customers to proceed in the face of these challenges.³¹ Without certainty as to such a standard, companies risk wasting valuable engineering resources, sacrificing other profit-making activity and suffering enormous opportunity costs in designing, building and testing a solution that might be made obsolete by the Commission's decision.

Moreover, proceeding in the face of a challenged industry standard, and the uncertainty as to the meaning of the assistance capability requirements, would risk having industry participants develop non-uniform solutions to CALEA. As TIA noted in its petition for rulemaking, carrier networks frequently intermix different manufacturers' devices.³² Thus, standards-based, compatible solutions are necessary to ensure that such devices are fully

³⁰ Even the network-based solution being developed by Bell Emergis and mentioned in the FBI's 1998 Implementation Report does not appear to be available by that date. *See Ameritech Petition*, at 6-7 ("Ameritech's switch and translations experts thoroughly reviewed and analyzed the Bell Emergis product according to the criteria established by the Interim Standard. Ameritech concluded that Bell Emergis' network-based solution had significant technical problems that would require substantial modification before it could operate with the existing network and be compliant with CALEA.").

³¹ TIA Petition, at 5-7 ("Because any modification in J-STD-025 could require complex changes in a manufacturer's individual CALEA solution, proceeding in the face of the current challenges to J-STD-025 would cause manufacturers to waste valuable engineering resources, sacrificing other profit-making activity, and expose the companies to the prospect of having to create several versions of its CALEA solution. This clearly would not serve the public interest."). *See also*, AT&T Wireless Petition, at 9-10; Carrier Association Response, at 11.

³² TIA Petition, at 6-7.

interoperable. Subtle design differences could cause system incompatibility, network unreliability and even failure.

An additional factor delaying implementation of CALEA solutions has been the Attorney General's failure to publish in a timely manner a notice setting forth the system wiretap capacity for all telecommunication systems covered by the statute.³³ Capacity and capability are closely interrelated—a manufacturer may design one solution to support 250 wiretaps per switch and a very different one to support 5 wiretaps per switch. CALEA required the Attorney General to provide these requirements to telecommunications industry associations, standard-setting organizations, industry participants and others no later than October 1995.³⁴ Unfortunately, the final notice of capacity was not promulgated until March 12, 1998³⁵ and is still subject to dispute;³⁶ thus hindering the development of capability requirements that would take into account law enforcement's capacity needs.

In addition, despite industry's repeated requests, it is TIA's understanding that the FBI has not yet identified a contractor to develop the collection equipment necessary for law

³³ See, e.g., Ameritech Petition, at 8; PrimeCo Petition, at 4-5.

³⁴ Section 104(a)(1) of CALEA; 47 U.S.C. § 1003(a)(1).

³⁵ *Implementation of Section 104 of the Communications Assistance for Law Enforcement Act*, 62 Fed. Reg. 12218 (March 12, 1998) ("Final Capacity Notice").

³⁶ See, e.g., Letter from Mr. Albert Gidari to Mr. H. Michael Warren, Section Chief, CALEA Implementation Section, FBI (March 28, 1998) (identifying several unclear provisions in the Final Capacity Notice) (hereinafter "Gidari letter"); Letter from Mr. H. Michael Warren to Mr. Albert Gidari (April 14, 1998).

Moreover, the Final Capacity Notice is limited to only those "services that are of most immediate concern to law enforcement -- that is, those telecommunications carriers offering local exchange services and certain commercial mobile radio services, specifically cellular service and personal communications service (PCS)." 62 Fed. Reg. at 12220. The Notice explicitly ignores numerous other technologies (such as paging, satellite and other types of mobile radio service) that the FBI has maintained are covered by CALEA.

enforcement to receive and process the information that will be provided under J-STD-025. This equipment is absolutely critical for interface testing before manufacturer's solutions can be installed in a carrier's system. Thus, even if a carrier were poised to install CALEA-compliant equipment there would be no means for testing the equipment or even for law enforcement to receive any information once the equipment is installed. This is clearly not what Congress intended when it passed CALEA.

Finally, as mentioned above, both J-STD-025 and the Department's recently released capacity notice only address wireline, cellular and PCS providers. Neither capacity nor capability requirements have been identified for several other segments of the industry (e.g., satellite and paging) that the FBI consider to be covered by CALEA. Senior officials of the Department and FBI have recognized that compliance for such segments will have to be postponed until after compliance for wireline, cellular and PCS providers has been resolved.

As the Commission knows, the telecommunications industry in general -- and TIA's members in particular -- have not been idle the last three years but have devoted enormous resources and made substantial, good faith efforts to implement CALEA in a reasonably timely manner and at a reasonable charge.³⁷ Despite these good faith efforts, however, CALEA-compliant technology will not be available by October 25, 1998 because of the substantial delays in establishing both capacity and capability requirements for CALEA. Accordingly, TIA requests that the Commission exercise its authority and grant a universal extension of the October 25, 1998 compliance date for at least two years.

³⁷ The FBI itself has acknowledged that the industry participants have not remained idle, noting "the good faith efforts of solution providers and carriers in developing a CALEA solution . . ." 1998 Implementation Report, at 15.

IV. Industry's Good Faith Compliance Efforts

Even prior to CALEA's enactment, the telecommunications industry began exploring solutions to law enforcement's concerns with new telecommunications technology. For several years preceding the enactment of CALEA, members of the telecommunications industry, including members of TIA, participated in the Electronic Communications Service Providers Committee ("ECSPC"), sponsored by the Alliance for Telecommunications Industry Solutions ("ATIS"), as well as its predecessor, the ad hoc "Technical Committee." Both entities were joint industry-law enforcement bodies established to address law enforcement's concerns.

In November 1994, shortly after CALEA's passage, the ECSPC -- including representatives from TIA and several of its members -- met to discuss CALEA and formed several "action teams" to create industry guidelines for support of CALEA. At the meeting, the FBI promised to create a detailed analysis of law enforcement's interception requirements -- what would eventually be known as the Electronic Surveillance Interface ("ESI") document.

At the same time, the telecommunications industry had selected TIA -- as an organization accredited by the American National Standards Institute ("ANSI") -- to serve as the "industry association or standard-setting organization" to issue a CALEA-compliant technical requirements standard.³⁸ TIA's Engineering Committee TR 45 also met with the FBI in late 1994, shortly after passage of CALEA, to begin to understand the requirements of law enforcement. In the spring of 1995, TIA began the process of initiating a standards program and

³⁸ Section 107(a)(2) of CALEA; 47 U.S.C. § 1006(a)(2). Much of the following discussion of the industry standards process has already been documented before the Commission. *See* TIA Petition, Appendix 2 (Testimony of Mr. Matthew J. Flanigan, President, Telecommunications Industry Association before the House Judiciary Subcommittee on Crime (Oct. 27, 1997)); TIA Reply Comments to CALEA NPRM, at 6-7; ACLU Comments to CALEA NPRM, at 9-10.

on May 12, 1995 such a standards program, Project Number ("PN") 3580, was formally initiated under the auspices of TIA Subcommittee TR45.2.³⁹ The subcommittee's intent was to complete a CALEA standard on an expedited basis and, indeed, by October 1995, TR 45.2 had adopted a baseline text approximately 170 pages long.

At the FBI's request, however, this early draft was not finalized or balloted in order to permit the FBI an opportunity to prepare its ESI and make technical contributions to the standard. Although CALEA grants *industry* the authority to establish a CALEA-compliant standard, TR 45.2 had encouraged the FBI to participate in its meetings from the outset in the hope that all interested parties could cooperate to formulate a satisfactory standard and avoid subsequent challenges before the Commission.

For several months, despite the fact that industry had a draft standard, TR 45.2 awaited the FBI's contribution. Finally, in July 1996, the FBI formally submitted its ESI document to TR 45.2. The ESI document was considerably more expansive than TIA's draft standard. Although the industry believed that many of the requirements in the FBI's ESI were not mandated by CALEA, the industry sought to reach a consensus standard with the FBI and reconcile their differences.

After several months of extended negotiations and attempts by industry to reach a compromise, in March 1997, TR 45.2 recognized that compromise was not going to be possible. Accordingly, the subcommittee submitted its standard -- Standards Proposal ("SP")-3580 -- to an

³⁹ For a while, TIA's efforts were limited to developing a standard for the wireless telephony industry. Committee T1, sponsored by ATIS, it was assumed would develop a standard for the wireline industry. Eventually, TR 45.2 and Committee T1 decided to combine their efforts and establish a joint standard for both the wireline and wireless industries, with TR 45.2 taking the lead. J-STD-025 is a joint standard of TIA and Committee T1.

ANSI public inquiry ballot. Despite the fact that SP-3580 embodied the enormous number of law enforcement surveillance requirements on which the FBI and industry were in agreement, the FBI characterized the proposed standard as a "disaster" because it did not include eleven additional items which industry and privacy groups had determined exceeded the scope of CALEA (the "punch list").⁴⁰

Rather than permit industry to promulgate its standard and then challenge the standard at the Commission (as CALEA provides), the FBI decided to prevent industry's adoption of its own standard and encouraged dozens of federal, state and local law enforcement agencies -- none of which had previously directly participated in the standards process -- to vote against the standard.⁴¹ Thus, even though the standard received strong support from the industry, it did not receive the "consensus" necessary to promulgate it as an ANSI standard.

Around the same time, the FBI filed a challenge with ANSI, seeking to revoke TIA's ANSI accreditation. In its long history as an industry standards-setting organization, TIA's accreditation has never been formally challenged. The FBI eventually withdrew its challenge two months later, but only after having placed a enormous strain on law enforcement-

⁴⁰ Several members of Congress have since agreed with the assessment of industry and the privacy groups. *See, e.g.*, 143 Cong. Rec. H10939 (daily ed. Nov. 13, 1997) (statement of Rep. Barr) ("I have also concluded that law enforcement has been using CALEA to overreach, and that the FBI is looking to use CALEA for the perfect solution to their wiretapping wishes. Indeed, many of the so-called 'punch-list' items clearly are beyond the scope of the Act."); Letter from Senator Patrick Leahy to Attorney General Janet Reno and Director Louis Freeh (Feb. 4, 1998) ("I understand that a proposed industry standard, SP-3580A, was circulated for adoption by carriers last year and that this standard, if adopted, would have solved the majority of the "digital telephony" problems identified by the FBI during congressional deliberation of this law. Nevertheless, the FBI criticized this standard for failing to provide a limited number of eleven functions (or "punch list capabilities"). Certain of these punch list items appear far beyond the scope and intent of CALEA . . .").

⁴¹ Thirty-five of the 94 ballots received on SP-3580 were "no" votes from law enforcement agencies; the overwhelming majority of which had not previously participated and had submitted identical votes using the FBI's form statement of opposition. Some industry trade publications ran stories claiming that the FBI was "stuffing the ballot box."

industry relations, causing TIA to have to expend legal resources defending itself, and achieving further delay in the CALEA implementation process.⁴²

After the defeat to SP-3580, Subcommittee TR45.2 revised its standard in response to some of law enforcement's and other's comments and submitted a complete reballot, SP-3580A, for an ANSI public inquiry vote in the summer of 1997. Simultaneously, the subcommittee also balloted the standard as an industry interim/trial use standard, in which only industry participants were entitled to vote.⁴³ Again, the proposed ANSI standard failed to achieve consensus -- despite almost unanimous approval by industry participants -- because of an enormous number of "no" votes submitted by law enforcement agencies that had not directly participated in the process.⁴⁴ The industry interim standard, however, was adopted and approved by TR-45.2 for submission to TIA for publication as an interim/trial use standard.

On December 5, 1997, TIA and Committee T1 jointly published the interim/ trial-use industry standard -- J-STD-025. This standard, at least for voice telephony, provided the *first* benchmark against which manufacturers could build. Of course, the standard has since been challenged by both the CDT and the Department and FBI as deficient. Thus, despite three years of good faith and substantial efforts on the part of the telecommunications industry -- planning,

⁴² FBI officials have since apologized for this action, characterizing the challenge as "unfortunate." See Testimony of Mr. H. Michael Warren, Section Chief, CALEA Implementation Section, Federal Bureau of Investigation before the House Judiciary Subcommittee on Crime (Oct. 27, 1997).

⁴³ Ironically, FBI participants in the standards process had originally *urged* TR 45.2 to ballot its standard as an interim/trial use standard. They expressed concern that an ANSI ballot would be in the public domain and indicated that they would prefer the industry standard to be a proprietary TIA document. TR-45.2, noting that CALEA permitted "any person" to challenge the standard under section 107, decided that an ANSI public inquiry ballot might be the more appropriate method of balloting since this would actively solicit input from other interested parties, such a privacy groups. Privacy advocates did, in fact, return ballots on the standard.

drafting, and negotiating a compromise standard -- the interim standard, challenged as both over- and underinclusive, remains enshrouded in uncertainty.

In addition to the standards process, several manufacturers have engaged in extensive, individual discussions with the FBI regarding CALEA implementation and their proposed CALEA solutions. The 1998 Implementation Report, for example, contains a representative list of meetings held in the second half of 1997.⁴⁵ These good faith efforts to reach an understanding with the FBI have imposed enormous engineering and administrative costs on the individual manufacturers, as the engineers responsible for implementing CALEA have been asked to prepare presentations for and respond to queries from the FBI. For several of TIA's members, such meetings began as early as the spring of 1996.

Moreover, since March of this year, such discussions have accelerated as TIA's members, at the request of the Attorney General and their carrier customers, have attempted to provide cost estimates of their CALEA solutions.⁴⁶ Again, these discussions have imposed tremendous opportunity costs on participating manufacturers. These discussions have continued despite the current challenge of J-STD-025.

V. CONCLUSION

Pursuant to its authority under sections 107(b)(5) and 107(c) of CALEA, TIA

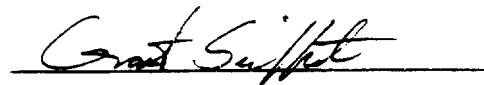
⁴⁴ For example, there were more "no" votes from Wisconsin sheriff's offices (93) than from the entire telecommunications industry.

⁴⁵ 1998 Implementation Report, Appendix A.

⁴⁶ See Letter from Messrs. Matt Flanigan (President, TIA), Jay Kitchen (President, PCIA), Roy Neel (President, USTA) and Thomas Wheeler (President, CTIA) to the Honorable Janet Reno (March 20, 1998).

urges the Commission to grant an immediate, industry-wide extension of the CALEA compliance date and provide a reasonable schedule for compliance to any new Commission-mandated technical requirements.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, L. Benjamin Ederington, an attorney in the law firm of Steptoe & Johnson, L.L.P., hereby certify that I have on this May 8, 1998 caused to be served by first class mail, postage prepaid, or by hand delivery, a copy of the foregoing Petition to the following:

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